

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HELEN DARLENE BIRNEY

Claimant

VS.

MEDICALODGE OF KINSLEY

Respondent

Self-Insured

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Docket Nos. 206,808 & 206,809

ORDER

Respondent appeals from the Award dated February 12, 1998, entered by then Assistant Director Brad E. Avery. The Appeals Board heard oral argument on July 1, 1998.

APPEARANCES

David J. Rebein of Dodge City, Kansas, appeared for the claimant. Kim R. Martens of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director found claimant had developed reflex sympathetic dystrophy (RSD) in her right upper extremity and bilateral carpal tunnel syndrome (CTS) as the result of her work-related accident. The Assistant Director awarded claimant permanent partial disability benefits for a 72.5 percent work disability. Respondent requests the Appeals Board review the Assistant Director's findings and conclusions concerning the nature and extent of claimant's disability and, in particular, whether the policy considerations announced in Foulk¹ limit claimant's disability award to her 9 percent impairment of function.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, rev. denied 257 Kan. 1091 (1995)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The parties stipulated that Helen Birney, the claimant, sustained personal injury by accident arising out of and in the course of her employment with the respondent, Medicalodge of Kinsley, on April 10, 1996.

Board-certified orthopaedic surgeon J. Mark Melhorn, M.D., performed two carpal tunnel release surgeries on Ms. Birney, one on each hand. Although she had some improvement from the surgeries, her symptoms persisted. The doctor rated claimant's impairment on September 8, 1995, at 7.05 percent to the left forearm and 9.45 percent to the right forearm and released her to return to work with restrictions of light medium work. He believed task rotation and a decrease in the weight guidelines would lessen the potential for reoccurrence and further clarified the restrictions following his January 30, 1996 office visit with claimant to limit lifting to 35 pounds maximum and 20 pounds frequent. Although he was concerned with the possibility of RSD, the doctor did not see any signs that claimant had developed RSD. By her next appointment on February 15, 1996, claimant's symptoms were worse and Dr. Amawi was recommending more surgery. They continued to worsen through his last examination on September 9, 1996, but Dr. Melhorn's recommendation for restrictions did not change. He did suggest claimant do her job tasks at a slower pace and that she perform stretching exercises for at least 5 minutes twice a day. Dr. Melhorn was asked by respondent's counsel to see claimant again, which he did on December 19, 1996. He did not find RSD at that time and his opinion did not change as to her restrictions and ability to perform work from a physical standpoint. He agreed, however, that claimant probably suffers from chronic pain syndrome.

Ms. Birney's attorney arranged an evaluation by Dr. Philip R. Mills who is board certified in physical medicine and rehabilitation. The doctor saw and examined claimant on October 28, 1996. The doctor found Ms. Birney had a nonfunctional grasp. She could not tolerate shaking hands. The doctor diagnosed mild right RSD syndrome that was causally related to her work injury and the CTS surgery. Although he believed additional testing would be needed to confirm that this diagnosis was permanent, he considered it was an accurate diagnosis to a reasonable degree of medical probability. According to Dr. Mills, claimant may not have reached maximum medical improvement and therefore he could not say if the RSD was permanent. The doctor, however, recommended restrictions of "[n]o resisted gripping or crimping, avoid repetitive or prolonged wrist flexion/extension, vibratory tools, direct wrist pressure or work environments less than 50 degrees without adequate clothing." But these restrictions were because of the carpal tunnel syndrome. If the RSD was permanent then she would be limited to performing tasks one handed. The Appeals Board finds the opinion of Dr. Mills to be the most credible in this instance.

Despite several attempts at accommodation within Dr. Melhorn's restrictions, claimant could not perform her work tasks with respondent. She terminated her employment with respondent because she could not physically perform the work. Thereafter, claimant made a good faith effort to find other work but was unsuccessful. Eventually, she applied for and

received social security disability benefits. Dr. Melhorn's records indicate these soon changed to social security retirement benefits on or about November 26, 1996. If so, claimant's permanent partial disability compensation should be reduced by the amount of those benefits². Unfortunately, neither claimant nor respondent put sufficient information into the record to compute the credit. In fact, it was not mentioned by either party during the litigation of the claim or in the briefs. Claimant's retirement does not otherwise affect the permanent partial disability benefits³. She is, therefore, entitled to her actual wage loss of 100 percent⁴. The Appeals Board agrees with the Assistant Director's finding of a 45 percent task loss and 100 percent wage loss for a 72.5 percent work disability⁵.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by then Assistant Director Brad E. Avery dated February 12, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David J. Rebein, Dodge City, KS
Kim R. Martens, Wichita, KS
Office of Administrative Law Judge, Garden City, KS

² K.S.A. 44-501(h).

³ See Lynch v. U.S.D. No. 480, 18 Kan. App. 2d 130, 850 P.2d 271 (1993); Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365, *rev. denied* 251 Kan. 937 (1992). See also, Gadberry v. R. L. Polk & Co., Docket No. 193,516 (July 1996), *aff'd* by Court of Appeals in unpublished opinion Docket No. 77,312 *filed* Jan. 23, 1998.

⁴ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ K.S.A. 44-510e(a).

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Philip S. Harness, Director